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No. 92-156

In The

Supreme Court of the United States

October Term, 1992

AURELIA SCHOLAR,

Petitioner,

v.

PACIFIC BELL, a Pacific Telesis Company, a corporation,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The petition for writ presents the following questions which do not merit this Court's review:

1) Whether the Ninth Circuit correctly found that the ninety-day statute of limitation for filing a Title VII action begins when the Equal Employment Opportunity Commission gives notice of a right to sue to a claimant at her designated address?

2) Whether the Ninth Circuit correctly found that the facts in this case do not establish a ground for equitable tolling of the statute of limitations under the standards established by this Court in *Irwin v. Veterans Admin.*, 498 U.S. ___, 111 S.Ct. 453 (1990) and *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984) (per curiam)?

PARTIES

All parties to the proceeding appear in the caption of the case.

Respondent submits the following information pursuant to Rule 29.1 of this Court's rules:

Respondent Pacific Bell is a wholly owned subsidiary of Pacific Telesis Group. All of Respondent Pacific Bell's subsidiaries are wholly owned except Bell Communications Research, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

OPINION BELOW 1

STATEMENT OF THE CASE 2

A. Nature Of The Case 2

B. Proceedings Below 4

REASONS WHY THE PETITION SHOULD BE DENIED 5

A. The Court Of Appeals' Decision Comports With The Language Of 42 U.S.C. § 2000e-5(f)(1) And Precedent From Other Circuits 6

B. The Seventh Circuit's Decision In *Archie v. Chicago Truck Drivers* Does Not Create A Conflict Which Merits This Court's Review 9

C. Court Of Appeals' Finding Of No Facts Justifying Equitable Tolling Does Not Present A Grounds For This Court's Review 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Archie v. Chicago Truck Drivers, 585 F.2d 210 (7th Cir. 1978) 6, 9, 10, 11

Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) (per curiam) 6, 12, 13

Bell v. Eagle Motor Lines, Inc., 693 F.2d 1086 (11th Cir. 1982) 11

Espinoza v. Missouri Pacific R. Co., 754 F.2d 1247 (5th Cir. 1985) 7, 11

Franks v. Bowman Transportation Co., 495 F.2d 398 (5th Cir. 1974), rev'd on other grounds, 424 U.S. 747 (1976) 11

Harvey v. City of New Bern Police Dep't., 813 F.2d 652 (4th Cir. 1987) 7

Hill v. John Chezik Imports, 869 F.2d 1122 (8th Cir. 1989) 7

Hunter v. Stephenson Roofing, Inc., 790 F.2d 472 (6th Cir. 1986) 7

Irwin v. Veterans Admin., 498 U.S. ___, 111 S.Ct. 453 (1990) 6, 8, 9, 12, 13

Jones v. Madison Services Corp., 744 F.2d 1309 (7th Cir. 1984) 11

Josiah-Faeduwor v. Communications Satellite Corp., 785 F.2d 344 (D.C. Cir. 1986) 8

Law v. Hercules, Inc., 713 F.2d 691 (11th Cir. 1983) 7

Lewis v. Conners Steel Co., 673 F.2d 1240 (11th Cir. 1982) 13

TABLE OF AUTHORITIES – Continued

Page

St. Louis v. Alverno College, 744 F.2d 1314 (7th Cir. 1984) 6, 8, 10, 11

Valenzuela v. Kraft, Inc., 801 F.2d 1170 (9th Cir. 1986) 10

Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) 10

STATUTES

Title VII of the Civil Rights Act of 1964

42 U.S.C. § 2000e-5(f)(1) 5, 6, 7

42 U.S.C. § 2000e-16(c) 8

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Pacific Bell respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 963 F.2d 264. This opposition will cite to the copy of the opinion reprinted in the appendix to the petition for a writ of certiorari (hereinafter "App.").

STATEMENT OF THE CASE

A. Nature Of The Case

From 1971 to 1988, Petitioner Aurelia Scholar was employed by Respondent Pacific Bell in non-management positions governed by a collective bargaining agreement. (App., p. 2, CR 31, ¶¶1, 26.) Between 1980 and 1987, Ms. Scholar had been rated "ready" for promotion to management. (CR 31, ¶¶14, 75.) However, she failed to obtain any of the dozen management positions she applied for during that time. (App., p. 2, CR 31, ¶16.) In 1986, a committee of five engineering managers reviewed the performance and management potential of Ms. Scholar and nine other non-management employees in their district. (App., p. 3, CR 31, ¶49.) The committee recommended that Ms. Scholar not be included in the "Ready Now" Binder, the list of nonsalaried employees designated eligible to apply for promotion to management. (App., pp. 2-3.) In January, 1987, Arthur Scholar, Ms. Scholar's husband and the district manager who had final authority over the "Ready Now" Binder determinations, approved the committee's recommendation. (App., p. 3, CR 31, ¶75.)

Thereafter, Ms. Scholar filed a charge alleging national origin discrimination with the Equal Employment Opportunity Commission ("EEOC"). The EEOC found no violation of Title VII (CR 31, ¶83), and Ms. Scholar appealed. By a letter dated October 26, 1988, the EEOC notified Ms. Scholar that the final investigation found no violation of the statute and the charge was dismissed. (App., p. 10.)

The EEOC sent the right-to-sue letter to Ms. Scholar on October 26, 1988, by U.S. certified mail. (App., p. 5, CR 31, ¶87.) The right-to-sue letter was delivered to Ms. Scholar's home on November 1, 1988. (App., p. 5.) The receipt for the letter was signed "A. Scholar" on that date. (CR 35, ¶3, Exh. 1.) Ms. Scholar claims that her daughter Laurene Villa signed the postal receipt; the record reveals that Laurene Villa, whose birth name was "Aurelia Villalobos" (CR 64, ¶2), was approximately 28 years old in 1988. (CR 34, Exh. 1, p. 6.)

Ms. Scholar alleges that although the letter was delivered to her home on November 1, 1988, she did not see the letter "until a few days after November 1, 1988." (App., p. 5, CR 56, ¶15.) The only corroborating evidence Scholar presented was the affidavit of her psychiatrist, who speculated as to when she might have learned of the letter. (App., p. 8, CR 55, ¶4.)[1]

The right-to-sue letter and attached information sheet delivered to Ms. Scholar's home on November 1, 1988, both informed her that she must file a private action within "90 DAYS FROM THE RECEIPT OF THIS DETERMINATION; OTHERWISE THE RIGHT TO SUE IS LOST." (App., pp. 10-11.) Scholar acknowledged that she read the letter a few days after it was delivered to her home and that she understood the contents, including the ninety-

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[1] Pacific Bell objected to the psychiatrist's affidavit on the grounds that his notes constituted inadmissible hearsay under Federal Rules of Evidence 801 and 802 and inadmissible opinion evidence under Federal Rules of Evidence 602, 701, 702, and 703. (CR 67, pp. 10-11.)

day filing requirement. (App., p. 7, CR 31, ¶90.) Nonetheless, she did not file her original complaint in federal district court until February 2, 1989, ninety-three days after receipt of the right-to-sue letter. (App., p. 7, CR 31, ¶89.)[2]

B. Proceedings Below

Ms. Scholar alleged that Pacific Bell discriminated on the basis of her national origin when her name was removed from the "Ready Now" Binder and that the "Ready Now" evaluation breached express and implied employment contracts under California state law. (CR 4.) Pacific Bell moved for summary judgment on the grounds that 1) the complaint was not filed within the ninety-day statute of limitation for Title VII complaints, 2) the complaint failed to make out a *prima facie* case of national origin discrimination, and 3) federal labor law preempted the state law contract claims. (CR 29.)

The district court granted Pacific Bell's motion on the grounds that Ms. Scholar failed to establish a *prima facie* case of discrimination, and that the contract claims were

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[2] Petitioner notes that she filed the complaint *in propria persona*. (Pet. for Writ, p. 4.) On October 2, 1989, Mr. Glenn Walling became Ms. Scholar's attorney of record. (CR 66, ¶6.) In a declaration filed with the district court, Mr. Walling stated that "[e]ven though plaintiff had the benefit of a legal advisor from time to time, she was not represented by counsel of record until October 2, 1989." (*Id.*) Mr. Walling represented Ms. Scholar in a settlement conference on July 18, 1989, although he was not counsel of record. (CR 52, ¶¶3, 4.)

governed by a collective bargaining agreement and thus preempted by federal law.[3] (App., p. 3.)

On appeal, both parties briefed and argued the issue of Ms. Scholar's failure to file her Title VII action within the statute of limitations prescribed by 42 U.S.C. § 2000e-5(f)(1). (App., p. 4.) A panel of the Ninth Circuit unanimously affirmed the grant of summary judgment on the grounds that Ms. Scholar failed to file her Title VII claim within ninety days from the receipt of the right-to-sue letter at her home, and she presented no evidence warranting equitable tolling. (App., pp. 8-9.) In reaching this decision, the Ninth Circuit relied on applicable precedent from the Fourth, Fifth and Eleventh Circuits and this Court. (App., pp. 5-8.) Ms. Scholar did not file a petition for rehearing.

REASONS WHY THE PETITION SHOULD BE DENIED

This case poses no special and important questions which merit this Court's discretionary review. The Ninth Circuit expressly followed the lead of the Fourth, Fifth and Eleventh Circuits when it held that the Title VII statute of limitations runs from the date a right-to-sue letter is delivered to a claimant's home, not the date she actually reads the letter. (App., pp. 5-6.) That holding

[3] The district court also denied Ms. Scholar's request to amend the complaint to add a claim for racial discrimination under 42 U.S.C. § 1981. The court held that, because she failed to show disparate treatment under Title VII, the proposed amendment under section 1981 would also fail and therefore was futile. (App., p. 3, CR 71, p. 13.)

comports with this Court's recent ruling that the statute of limitations for a Title VII suit against the federal government begins to run when a right-to-sue letter is delivered to the home of the claimant or the office of his attorney, whichever is earlier. *Irwin v. Veteran's Administration*, 498 U.S. ___, 111 S.Ct. 453 (1990).

The petition claims that the decision in this case creates a conflict with the Seventh Circuit's opinion in *Archie v. Chicago Truck Drivers*, 585 F.2d 210 (7th Cir. 1978) (Judge Wood dissenting). (Pet. for Writ, pp. 4-8.) However, as the Ninth Circuit pointed out, *Archie* is now dubious authority. (App., p. 6, n.3.) The foundational assumption in *Archie* that the ninety-day period is jurisdictional rather than a statute of limitation subject to equitable tolling has been overruled, and more recent cases in the Seventh Circuit have limited the holding of *Archie* to its facts. *See St. Louis v. Alverno College*, 744 F.2d 1314, 1317 (7th Cir. 1984). Thus, this case does not represent a "head on" conflict with *Archie*. (Pet. for Writ, p. 8.)

The Ninth Circuit found that the facts presented by Ms. Scholar did not warrant equitable tolling under the guidelines set forth in *Irwin, supra*, and *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984) (per curiam). That finding presents no special issues of general application which warrant review.

A. The Court Of Appeals' Decision Comports With The Language Of 42 U.S.C. § 2000e-5(f)(1) And Precedent From Other Circuits

The Court of Appeals properly found that the EEOC gave Ms. Scholar notice when the right-to-sue letter sent

certified mail was received and signed for at Ms. Scholar's residence. (App., p. 7.) This finding correctly interprets the language of 42 U.S.C. § 2000e-5(f)(1) which establishes the statute of limitations for private sector Title VII actions; it specifies that the ninety-day period runs from the EEOC's "giving of such notice" rather than from the date the claimant actually "receives" or reads the notice.

In ruling that Ms. Scholar had been given notice when the right-to-sue letter was delivered to her home, the Ninth Circuit also relied on the guidance of cases involving almost identical fact scenarios from the Fourth, Fifth and Eleventh Circuits. (App., pp. 5-7.) *See Harvey v. City of New Bern Police Dept.*, 813 F.2d 652, 654 (4th Cir. 1987) (period began when letter delivered to claimant's home and received by his wife, not when claimant actually received letter); *Espinoza v. Missouri Pacific R. Co.*, 754 F.2d 1247, 1250 (5th Cir. 1985) (period began when letter delivered to claimant's address and accepted by wife, not when claimant read letter several days later); *Law v. Hercules, Inc.*, 713 F.2d 691, 693 (11th Cir. 1983) (period ran from date that claimant's son picked up right-to-sue letter, not the date when son gave letter to claimant). The Sixth, Seventh, Eighth, and District of Columbia Circuits have also ruled that the language of 42 U.S.C. § 2000e-5(f)(1) does not require that a claimant be given actual notice of the right-to-sue letter before the ninety-day period begins. *Hill v. John Chezik Imports*, 869 F.2d 1122, 1124 (8th Cir. 1989) (ninety-day period began when letter delivered to claimant's former address, not when claimant actually received letter); *Hunter v. Stephenson Roofing, Inc.*, 790 F.2d 472, 475 (6th Cir. 1986) (period runs

from date five days after letter sent to claimant's former address, not when claimant actually saw letter); *Josiah-Faeduwor v. Communications Satellite Corp.*, 785 F.2d 344, 345 (D.C. Cir. 1986) (period runs from the date letter delivered at office of claimant's counsel, not from date that claimant received a copy); *St. Louis v. Alverno College*, 744 F.2d 1314, 1317 (7th Cir. 1984) (ninety-day limit begins running on the date letter was delivered to address claimant provided to EEOC, not on date claimant finally received the letter).

Although this Court has not ruled on when the statute of limitation begins running for private sector Title VII claimants, it has ruled that the limitation period for claims against the federal government begins when a right-to-sue letter is delivered to the claimant's address or to the office of his attorney, whichever comes first. *Irwin v. Veterans Administration*, 498 U.S. ___, 111 S.Ct. 453, 456 (1990). In *Irwin*, this Court interpreted 42 U.S.C. § 2000e-16(c), which required government employee claimants to file complaints " '[w]ithin thirty days of receipt of notice of final action taken. . . . ' "[4] 111 S.Ct. at 455. This Court held that a complaint, filed twenty-nine days after the claimant received a right-to-sue letter but forty-four days after the letter was delivered to his attorney's office, was properly dismissed as untimely. This Court noted that "§ 2000e-16(c) requires only that the EEOC notification letter be 'received'; it does not specify receipt by the claimant. . . . " 111 S.Ct. at 456.

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[4] 42 U.S.C. § 2000e-16(c) now provides that Title VII complaints against the federal government must be filed "[w]ithin ninety days of receipt of notice of final action. . . . "

In addition to abiding by the statutory language and precedent from other Circuits, the Ninth Circuit's decision fosters certainty and curtails factual disputes regarding notice. As this Court pointed out in *Irwin*, the "practical effect" of the actual notice interpretation urged by the Petitioner in this case "would be to encourage factual disputes about when actual notice was received, and thereby create uncertainty in an area of the law where certainty is much to be desired." 111 S.Ct. at 456. The Ninth Circuit's holding gives meaning to the statutory limitation, creates the desired certainty and presents no grounds for this Court's review.

B. The Seventh Circuit's Decision In *Archie v. Chicago Truck Drivers* Does Not Create A Conflict Which Merits This Court's Review

The petition rests on the shaky foundation of a 1978 Seventh Circuit decision, *Archie v. Chicago Truck Drivers*, 585 F.2d 510 (7th Cir. 1978). In that decision, two members of the panel held that the Title VII statute of limitations began to run when the claimant actually read the right-to-sue letter rather than when his wife received the letter at their home. As the Ninth Circuit explained in this case, the twin pillars of the majority decision – the assumption that the ninety-day period was jurisdictional and a Fifth Circuit case – have now been discredited. (App., p. 6, n.3.) The dissenting judge in *Archie* stated that "an employer is entitled to a more certain rule and one that does not create a temptation for family perjury which will often be difficult, if not impossible to reveal." 585 F.2d at 223. Recent decisions in the Seventh Circuit have

limited the *Archie* "actual notice" holding and, as discussed above, other Circuits have opted for the dissent's "more certain rule" finding "receipt" when a right-to-sue notice is delivered at a claimant's address.

First, the Seventh Circuit in *Archie* assumed that compliance with the ninety-day period is "a jurisdictional prerequisite to suit, and failure to comply with that time limitation will terminate the complainant's cause of action." 585 F.2d at 214. This assumption influenced the majority's decision to start the time period when the claimant actually received the right-to-sue letter and thus to save his cause of action. However, the Seventh Circuit's rationale is no longer good law. The Seventh Circuit now recognizes that time requirements in Title VII are statutes of limitations subject to waiver, estoppel and equitable tolling. *St. Louis v. Alverno College*, 744 F.2d 1314, 1316, n.2 (7th Cir. 1984), discussing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). *See also Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1174 (9th Cir. 1986) (ninety-day period is a statute of limitations).

As this Court found in *Zipes*, the distinction between a jurisdictional requirement and a statute of limitations is significant.

> By holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement to give prompt notice to the employer. 455 U.S. at 398.

As *Archie* is based on a now overruled assumption that negates the purpose of the filing requirement, it does not conflict with the Ninth Circuit's decision.

Second, the majority in *Archie* relied heavily on *Franks v. Bowman Transportation Company,* 495 F.2d 398 (5th Cir. 1974), rev'd on other grounds, 424 U.S. 747 (1976). *See Archie,* 585 F.2d at 215-16. In *Franks,* the Fifth Circuit found that because the claimant's nine year old nephew accepted and lost the first right-to-sue letter, claimant's time to file suit did not begin to run until he received a new letter from the EEOC. However, the Fifth Circuit now has re-examined its rationale in *Franks* and adopted a rule that "the giving of notice to the claimant at the address designated by him suffices to start the ninety-day period. . . . " *Espinoza v. Missouri Pacific R. Co.,* 754 F.2d 1247, 1250 (5th Cir. 1985) citing *Bell v. Eagle Motor Lines, Inc.,* 693 F.2d 1086 (11th Cir. 1982). Thus, the Fifth Circuit's support of the *Archie* decision has been eroded.

Finally, the Seventh Circuit itself has curtailed the "actual receipt by claimant" rule of *Archie. See Jones v. Madison Services Corp.,* 744 F.2d 1309, 1312 (7th Cir. 1984) (ninety-day period begins to run on date right-to-sue notice is received by claimant or by his attorney); *St. Louis v. Alverno College,* 744 F.2d 1314, 1317 (7th Cir. 1984) (ninety-day period begins to run on date right-to-sue letter is delivered to address claimant provided to EEOC, not when claimant actually receives letter). In short, the petition does not cite any recent Seventh Circuit decision which squarely conflicts with the Ninth Circuit's ruling in this case. Accordingly, the petition presents no conflict between the Courts of Appeals which warrant this Court's review.

C. Court Of Appeals' Finding Of No Facts Justifying Equitable Tolling Does Not Present A Grounds For This Court's Review

The Ninth Circuit followed this Court's guidance and found that Ms. Scholar made no showing to justify invocation of the doctrine of equitable tolling. (App., pp. 7-8, discussing *Irwin v. Veterans Admin.*, 498 U.S. ___, 111 S.Ct. 453, 457-58 (1990); *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984) (per curiam).) This holding does not present an important or special question for this Court's review.

The petition alleges that the right-to-sue letter mislead Scholar because it stated that a suit must be filed "within 90 days of receipt of this Determination." (Pet. for Writ, p. 10, App., pp. 10-11.) However, in *Baldwin*, this Court noted that almost identical language[5] provided an *in propria persona* claimant adequate notice of her obligation to file a complaint within ninety days. 466 U.S. at 151. Moreover, Ms. Scholar admitted that she read the letter a few days after it arrived at her home and understood the contents. (App., p. 7.) As the Ninth Circuit found, even accepting Ms. Scholar's account of the facts, she had ample time to file a complaint, yet failed to do so and offered no explanation for her delay. (App., p. 8.)

The Ninth Circuit's ruling on a factual issue presents no important question for this Court's review, especially

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[5] In *Baldwin*, the claimant received a notice which stated that if the claimant decided to sue her employer "such suit must be filed in the appropriate United States District Court within ninety days of [her] receipt of this Notice." 466 U.S. at 148.

because the decision conforms to the standards enunciated by this Court in *Baldwin* and *Irwin*. This Court has "been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Irwin*, 111 S.Ct. at 458. Thus, the Ninth Circuit correctly found that to allow Ms. Scholar additional time to file based on her psychiatrist's conjecture about when she might have received the notice would foster "a manipulable open-ended time extension" and thus "render the statutory limitation meaningless." (App., p. 8, citing *Lewis v. Conners Steel Co.*, 673 F.2d 1240, 1242 (11th Cir. 1982).)

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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